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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

THE PEOPLE, Plaintiff and Respondent, v. WILLIAM ROBERT MURRAY, Defendant and Appellant.	C045509 (Super. Ct. Nos. 62-026501, 62-032076, 62-030937)

Defendant William Robert Murray pleaded no contest to stalking (Pen. Code, § 646.9, subd. (b); further undesignated statutory references are to this code) and resisting an executive officer (§ 69). He also pleaded guilty to corporal injury to a spouse (§ 273.5, subd. (a)) and admitted having served two prior prison terms. (§ 667.5, subd. (b).) In exchange for his plea, remaining charges were dismissed and the parties stipulated to a five-year prison term.

The trial court permitted defendant to be released on bail on the condition that he enter into a *Cruz*[1] waiver. Thereafter, the trial court found he had violated a term of his conditional release by failing to report to the probation department. Accordingly, the trial court imposed an additional two years and eight months onto his sentence.

On appeal, defendant contends the trial court erred in finding he had violated the terms of his conditional release. We affirm.

BACKGROUND

We dispense with a recitation of the facts underlying defendant's offenses as they are unnecessary to the resolution of this appeal.

On September 30, 2003, defendant entered into a plea agreement wherein he agreed that, in exchange for his plea to three felonies and a misdemeanor in three separate cases and admission to having served two prior prison terms, he would receive a stipulated prison term of five years.

As part of the plea agreement, defendant agreed that if he were to be released on bail between entry of his plea and sentencing, he would comply with the following conditions: (1) he would appear for sentencing on October 14, 2003; (2) he would not contact either of the victims and would remain 250 yards away from them; (3) *he would report daily to the probation*

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[1] *People v. Cruz* (1988) 44 Cal.3d 1247.

officer; (4) he would not consume alcohol or frequent businesses that sold alcohol; (5) he would abide by a 9:00 p.m. to 6:00 a.m. curfew; (6) he would submit to searches and chemical testing; (7) *he would provide the probation office with his address* and would be able to have phone contact with the probation office. Defendant agreed that if he violated any of those conditions, the court would consider that in sentencing and he would receive an additional two years and eight months without being permitted to withdraw his plea. This agreement was styled as a "*Cruz* waiver."[2] Defendant was told to report to probation within 24 hours of his release.

Defendant was released from custody on Wednesday, October 1, 2003. On October 8, 2003, violation proceedings began in which it was charged that he had violated the conditions of his release by failing to report to the probation office. A contested hearing was held on October 21, 2003.

Terry Franchimone, manager of adult supervision for the Placer County Probation Office, testified he was not certain but was probably at work on Thursday, October 2, 2003. At that time, he was unaware of the court order requiring defendant to report to the probation office. He was contacted by the district attorney's office on October 3, 2003, and informed of the court's order. At this point, because of defendant's prior record, he assigned two officers to locate defendant. Between

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[2] *People v. Cruz, supra,* 44 Cal.3d at page 254, footnote 5.

October 3 and October 6, 2003, there was no known contact from defendant. The probation officers attempted to locate defendant at several former addresses listed in the probation office files. He was finally located approximately two miles from the probation office and arrested on Monday, October 6, 2003, at approximately 8:30 p.m.

Franchimone also explained the practices of the probation office. Ordinarily, if a probationer was to contact the office and no officer had been assigned to the case, the call would be forwarded to him. Franchimone never got a call or message from defendant. No one is assigned to answer general telephone calls to the probation office on weekends.

Although defendant was not currently on probation in October 2003, he was in the probation office computer system. It is the practice of the probation office that if an individual submits a new address, the address would be immediately changed in the system. The last entry for defendant was made more than six months before his pleas in this case, i.e., on March 17, 2003.

Defendant did not testify at the hearing. The parties stipulated that, if called to testify, defendant's sister would testify she was present on Thursday, October 2, 2003, on or around 3:15 p.m., when defendant placed a telephone call to the probation office. While defendant was on hold with the department, she was advised defendant was not in the computer and the woman on the phone said there was "nothing I can do."

Substantiating telephone records were not available because it was a local call.

The trial court first stated it did not "give much credibility" to and did not believe the stipulated testimony of the sister, as it did not sound like the way the probation office operates. The court went on to emphasize there were three weekdays in question, Thursday, Friday and Monday, and defendant had made no other attempts to contact the office. Defendant was not disabled and was located within walking distance of the probation office. Thus, even if he had a problem making contact by telephone, he could have done so in person. However, although ordered to report to the probation office every day, he had made no attempt to contact the office other than the purported call on October 2, 2003. Therefore, it was "crystal clear" defendant had violated the terms of his release agreement.

DISCUSSION

I

Defendant contends the trial court erred in finding he had violated the terms of his conditional release. He argues the trial court was required to accept as true that he had attempted to contact the probation office but was unsuccessful because the person on the phone did not know he had a duty to report because that fact had been established by a stipulation accepted by the court. Defendant's premise fails.

The record reflects the parties entered into a stipulation only to the effect defendant's sister would testify defendant

called the probation office in her presence and she was told he was not in the computer so the person on the phone could not help him. The parties did *not* stipulate defendant did, in fact, call the probation office. Indeed, whether or not defendant contacted the probation office was the main point of dispute at the hearing. Thus, the trial court was not required to accept truthfulness or reliability of the testimony.[3]

In any event, the trial court specifically stated there were three workdays and an intervening weekend, defendant had been required to contact the probation office, and there were "no other attempts to contact" the office. Accordingly, the court found it was "crystal clear" defendant had violated the conditions of his release. Thus, even if the court had been required to accept the underlying facts of the stipulated testimony as defendant now argues, the court did not err in finding defendant violated the terms of his conditional release.

Defendant also argues his right to due process and fundamental fairness was violated because his failure to contact probation was at least partially the result of the prosecutor's

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[3] Defendant argues the court was required to have defendant's sister called to testify to observe her demeanor if it was not inclined to believe the underlying facts of her proffered testimony. It was, however, defense counsel's tactical decision to enter the testimony through stipulation rather than through live testimony. Notably, defense counsel did not request to reopen evidence after the court indicated it was not inclined to believe the substance of the stipulated testimony. The court was not required to force defendant's sister to testify before weighing the stipulated testimony against the other evidence presented at the hearing.

failure to notify the probation office of the terms of his conditional release. Defendant cites *Morrissey v. Brewer* (1972) 408 U.S. 471 [33 L.Ed.2d 484] (hereafter *Morrissey*) and *People v. Vickers* (1972) 8 Cal.3d 451 (hereafter *Vickers*) in support of his position.

Due process and fundamental fairness in a collateral hearing require that a defendant be afforded a hearing which conforms to *Morrissey* standards. The minimum requirements of due process at the parole revocation hearing were stated in *Morrissey* to be: "(a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement of the factfinders as to the evidence relied on and reasons for revoking parole." (*People v. Vickers, supra,* 8 Cal.3d at p. 457.)

The substance of defendant's argument, however, is not that he was not afforded a formal hearing in conformity with *Morrissey/Vickers*, but that the court should have defaulted in his favor and granted him leniency for his violation of the conditional release agreement under the circumstances. Notions of due process and fundamental fairness do not so require.

Finally, the stipulated additional two years and eight months upon finding that defendant failed to comply with the conditions of his release resulted in the imposition of the upper term for the stalking conviction in case No. 62-026501. Accordingly, we requested supplemental briefing on whether defendant's sentence is affected by the Supreme Court's decision in *Blakely v. Washington* (2004) 542 U.S. ___, ___ [159 L.Ed.2d 403, 413-414] (hereafter *Blakely*). This request, however, was improvidently made as *Blakely* is irrelevant to the type of factual determination at issue in this case.

Plea agreements are a judicially and legislatively recognized procedure that reciprocally benefits the People and the defendant. (*People v. Masloski* (2001) 25 Cal.4th 1212, 1216; *People v. Orin* (1975) 13 Cal.3d 937, 942; Pen. Code, § 1192.5.) The record establishes the parties themselves negotiated for the provision that allowed for an increased sentence, i.e., the upper term, if defendant did not comply with the specified conditions of release pending sentencing. Therefore, the conditions of his release pending sentencing were an agreed-upon valid part of the plea agreement and the agreement, itself, provided alternate sentences depending upon whether he complied with the conditions of his release.

The trial court explicitly explained it was the judge who would be considering any violation of the release agreement and repeatedly affirmed defendant understood that if he violated the agreement, the judge would consider that and sentence him to an additional two years and eight months, i.e., the upper term.

The trial court did not impose an aggravated term based on sentencing factors not admitted by defendant. Instead, the trial court imposed the stipulated term agreed on by the parties should defendant fail to comply with the conditions of his release; a sentence no more onerous than that to which defendant expressly agreed as part of the bargain itself.

II

Defendant also notes the abstract of judgment did not reflect the proper amount of custody credits as pronounced by the trial court at sentencing. The People appropriately conceded the abstract should be corrected. The trial court did so and has since prepared a corrected abstract of judgment properly reflecting defendant's custody credits as 298 days, consisting of 199 days of actual custody and 99 days of conduct credit.

DISPOSITION

The judgment is affirmed.

NICHOLSON, J.

We concur:

SCOTLAND, P.J.

RAYE, J.